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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION and GERALD KRESS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In deciding whether a nominally civil prospective judgment under the False Claim Act is barred by the Double Jeopardy Clause under *United States v. Halper,* must the District Court conduct a particularized inquiry as to the Government's costs of investigation and prosecution when determining whether or not the prospective judgment is compensatory, where the prospective judgment is approximately 5 times the amount of the Government's loss, is approximately $2 million in excess of the Government's loss, and the amount of the Government's loss is in excess of $500,000?

Subsumed within this question are the questions of whether or not the Double Jeopardy Clause and the holding of *United States v. Halper* apply:

(a) to persons who are not "small gauge offenders";

(b) to cases in which the subsequent civil remedy following criminal prosecution contains an element that is partly remedial;

(c) to cases in which the subsequent civil remedy is not a huge multiple of the loss caused by the criminal conduct on the order of the 220 multiple of damages in *United States v. Halper;*

(d) to the treble damage portion of a False Claims Act recovery; and

(e) to cases in which the Government contends that it cannot account to the court as to its costs of prosecution?

LIST OF ALL PARTIES

The parties in interest in this proceeding are those named in the caption of this Petition.

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REFERENCE TO OPINIONS OF COURTS BELOW

The United States Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the Eastern District of Pennsylvania by Judgment Order without opinion. The disposition by the United States Court of Appeals has been reported at 47 F.3d 1162 (1995). The District Court's opinion has been reported on LEXIS at 1993 U.S. Dist. LEXIS 18013 and 39 Cont. Cas. Fed. (CCH) Contracting Reporter ¶76,610 (E.D. Pa. 1993). Copies of the District Court's Opinion and Order and the Judgment Order of the Court of Appeals are appended hereto.

Following the issuance of the Judgment Order by the Court of Appeals, appellant filed a Petition for Rehearing *En Banc*. The Court of Appeals, by Order dated February 13, 1995, required the United States to respond to the Petition for Rehearing. On March 10, 1995, the Court of Appeals, a majority of the sitting judges not having voted in favor of rehearing, denied the Petition. Copies of the February 13 and March 10 Orders are also included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 23, 1995. A timely Petition for Rehearing was denied by Order of Court dated March 10, 1995. This Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

False Claim Act, Sec. 1, 31 U.S.C. § 3729.

(a) **Liability for certain acts.** Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of dam-

ages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined.** For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or

property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This is the second of two proceedings brought by the Federal Government against defendants Gerald Kress and Educational Development Network ("EDN"). The first was a criminal matter in which defendants, after pleading guilty to multiple counts of filing false claims in connection with a series of contracts between EDN and the Department of Defense, were sentenced to pay fines, $300,000 of restitution and to a term of imprisonment. The second proceeding now before this Court is nominally a civil proceeding brought under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

In this proceeding the Government seeks to punish Kress and EDN again for the same conduct that was punished in the criminal matter. Liability herein was premised solely on the collateral estoppel effect of the guilty pleas in the criminal matter. There is, therefore, an exact identity between the conduct punished in the criminal proceeding and the conduct sanctioned in this matter.

As to damages, the District Court found that $504,376.98 was the actual amount of the Government's loss resulting from defendants' criminal conduct. (*See* A-25.) However, the District Court entered a judgment against defendants in the amount of $2,344,530.94. This judgment was arrived at by applying the formula spelled out in the False Claims Act, that is, by: (1) multiplying the $504,376.98 in actual damages by three ($504,376.98 x 3 = $1,513,130.94), and (2) adding $1,070,000, an amount equal to $5000 times the number of false claims ($5000 x 214 = $1,070,000). To that total the District Court added $61,400, an amount equal to an illegal gratuity paid by Kress to an Army National Guard official, and subtracted the $300,000 restitution already paid in the criminal proceeding.

This judgment exceeds the damages found by the District Court to have been sustained by the Government by $1,840,153.96. If one adds to the judgment the $300,000 already paid by defendants to the Government in restitution in the criminal matter, the total restitution recovery sought by the Government is $2,140,153.96 greater than its damages.

Relying principally on *United States v. Halper,* 490 U.S. 435 (1989), and *Department of Revenue of Montana v. Kurth Ranch,* __ U.S. __, 114 S. Ct. 1937 (1994), defendants contended that since the Government's requested judgment exceeded the damages claimed by it to have resulted from the false claims submitted by defendants by some $2.1 million, it was necessary for the court to conduct a "particularized inquiry," as mandated by *Halper*, to determine whether the amount of the judgment in excess of the damages proven by the Government bore some reasonable relationship to the Government's costs in investigating and prosecuting defendants.

The District Court simply did not undertake any such analysis. As noted above, it found that the damages sustained by the Government as a result of defendants' criminal conduct were $504,376.98. The court, however, made no finding as to the costs of investigation and prosecution of defendants; nor could it have, since the Government offered no evidence on that point. In place of that analysis, the District Court summarily stated, without any factual support, "I reject defendants' arguments as I believe their reading of relevant Supreme Court precedents ignores the cost to the government of detecting and punishing illegal activity"; and, "I conclude that the $2,344,530.94 sought by the Government bears a rational relationship to the goal of compensating the government for its loss." (*See* A-7-A-10.) *No factual basis exists for that finding, and no factual inquiry was even attempted.*

On appeal, the Court of Appeals Panel did not hear oral argument and issued a Judgment Order affirming the decision of the District Court, without opinion. After a Petition for Rehearing was filed, the full Court of Appeals required the United States to file a response to the Petition, but ultimately denied the Petition.

REASONS FOR GRANTING A WRIT OF CERTIORARI

THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CLARIFY THE HOLDING OF *UNITED STATES V. HALPER* AND ISSUES RELATED TO ITS APPLICATION BECAUSE THE SCOPE OF THE *HALPER* RULING IS NOW CONFUSED DUE TO NUMEROUS INCONSISTENT DECISIONS PURPORTING TO APPLY IT.

1. The Decision in *United States v. Halper.*

In *United States v. Halper,* 490 U.S. 435 (1989) and more recently, in *Department of Revenue of Montana v. Kurth Ranch,* ____ U.S.____, 114 S. Ct. 1937 (1994), this Court held that where a nominally civil proceeding imposes what amounts to a second punishment against a person for the same conduct for which he or she was earlier punished in a criminal proceeding, it constitutes a violation of the Double Jeopardy Clause of the Fifth Amendment and accordingly is impermissible.

In *Halper,* the Court held that, "under the Double Jeopardy Clause a defendant who already has been punished in a criminal proceeding may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-49. Specifically, the Court held,

> . . . it follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term . . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448-49 (emphasis added).

Thus, after *Halper,* there is no longer a question as to the double jeopardy implications of an action under the False Claims Act following a criminal prosecution for the same underlying conduct. If the second sanction, "may not fairly be characterized as remedial," 490 U.S. at 449, it is not permissible under the Constitution.

The Court in *Halper* also explained how lower courts should determine whether a civil sanction under the False Claims Act constitutes punishment. The resolution of that issue is not an "exact pursuit," the Court said, but requires "a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." 490 U.S. at 448. The Court announced what it called a "rule of reason":

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment. We must leave to the trial court the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

490 U.S. at 449-50.

The Court then remanded to the District Court to allow the Government to submit evidence as to its costs, but even as it did so, stated that it agreed with the District Court, "that the disparity between its [$16,000] approximation of the Government's costs and Halper's $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy," 490 U.S. at 452, thereby holding that the disparity of $114,000 between costs and the False Claim Act recovery was sufficiently wide to demonstrate that the excess recovery was punitive in nature.

2. The Decision in *Department of Revenue of Montana v. Kurth Ranch.*

Recently, the Court reaffirmed the *Halper* holding. In *Department of Revenue of Montana v. Kurth Ranch,* ____ U.S. ____, 114 S. Ct. 1937 (1994), this Court held that where a person was tried, convicted and punished for possession of marijuana, a "tax" of $1,000 per ounce of marijuana — in that case, $181,000 — imposed on him because of that possession constituted a double jeopardy. Although the Court stated that *Halper* did not directly answer the question of whether a tax constituted a punishment barred by the Double Jeopardy Clause, it did draw on elements of its holding in *Halper,* stating, "[w]e also recognized in *Halper* that a so-called civil 'penalty' may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct." 114 S. Ct. at 1945.[1]

The Court did not rely on a *Halper*-type comparison of the Government's actual damages attributable to the defendants' conduct with the assessed marijuana tax, but it did observe that even if it had done so, the result would not have justified the tax as compensatory and therefore proper under the Double Jeopardy Clause because the state had not claimed that the $181,000 tax, "even remotely approximates the cost of investigating, apprehending, and prosecuting the Kurths, or that it roughly relates to any actual damages that they caused the State." 114 S. Ct. at 1948. Thus, while not expressly relying on a *Halper* "particularized analysis" for its

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1. Chief Justice Rehnquist, in dissent in *Kurth Ranch,* similarly described *Halper's* holding:

> In *Halper,* we held that the double jeopardy test was whether or not the penalty statute there enabled the Government to recover more than an approximation of its costs in bringing the fraudulent actor to book. . . . 114 S. Ct. at 1949.

Justice Scalia, also in dissent in *Kurth Ranch,* characterized *Halper* as follows:

> [w]e held that the Double Jeopardy Clause prevented [a civil fine for the same conduct for which the defendant had already been punished] to the extent that the fine exceeded what was needed to cover " 'legitimate nonpunitive governmental objectives.' " 114 S. Ct. at 1957.

result, the Court held that a difference of $181,000 between the Government's costs and the civil recovery was impermissible.

From *Halper* and *Kurth Ranch,* it is apparent that this Court intended that lower courts conduct *specific* and *particularized assessments* based on factual determinations of the Government's costs to assess the character of a proposed False Claims Act sanction. This necessarily requires a consideration of the relation between, on the one hand, the putative recovery under the Act and, on the other, the "actual damages that [defendants] caused the [Government]." 114 S. Ct. at 1948.

3. The Rulings of United States Courts of Appeals Applying the *Halper* Decision.

Regrettably, the *Halper* and *Kurth Ranch* decisions have led to a great deal of confusion in the lower courts as to their meaning.

Certain Courts of Appeals have required accountings in accordance with *Halper* in circumstances like those present here. *See United States v. Hudson,* 14 F.3d 536 (10th Cir. 1994); *United States v. Mayers,* 897 F.2d 1126 (11th Cir.), *cert. denied,* 498 U.S. 865 (1990). In those cases the Courts remanded the matters to require particularized determinations of a type requested by the defendants in this case but refused by the District Court and the Court of Appeals.

In another case, however, the same Court of Appeals which decided *Mayers* found, without any particularized factual assessment, that a $35 million excess award under the False Claims Act was *not* a punishment. *United States v. Barnette,* 10 F.3d 1553 (11th Cir.), *cert. denied,* 115 S. Ct. 74 (1994).

Still other Courts of Appeals have found a second sanction permissible under the Double Jeopardy Clause, but only after considering carefully findings made by the District Courts noting the relationship between the first sanctions imposed and the damages caused by the defendants. *See United States v. Morgan,* 51 F.3d 1105 (2d Cir. 1995); *United States v. Williams,* 1995 U.S. App. LEXIS 13019 (May 30, 1995).

To understand how *Halper* has been applied and the issues associated with its application, it is necessary to review each of these cases in some detail.

United States v. Hudson — Tenth Circuit

United States v. Hudson, 14 F.3d 536 (10th Cir. 1994), presented the reverse of the situation in the instant matter, that is, the ostensibly civil remedies preceded the criminal conviction. The defendants moved to dismiss the criminal indictment on the grounds that two nominally "civil" sanctions, one a debarment order prohibiting the defendants from participating in banking activities, and the other monetary sanctions of $16,500 for one defendant and $15,000 for the other two, were punitive, thereby barring under *Halper* the subsequent criminal prosecution. The District Court held that the debarment sanction was remedial in nature and not punitive, and therefore that a subsequent criminal prosecution based upon the same conduct that had led to the debarment order did not violate the Double Jeopardy Clause. As to the monetary sanctions, the District Court found that the fines were reasonable under the operative statutes, that those statutes served legitimate remedial goals, and therefore that the monetary sanctions were not punitive. *See* 14 F.3d at 542.

The Court of Appeals reversed and remanded the matter to require an accounting as to the Government's actual injury that the civil fines were intended to sanction, noting as it did so,

> [i]n deciding whether or not the fines are solely remedial, the court must determine the precise injury caused to the Government for which the sanctions are the remedy. . . . If there was no injury to be remedied, then presumably the fines were imposed to deter the Appellants from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable.

14 F.3d at 543. Thus, the Tenth Circuit specifically required a *Halper*-like accounting in a case involving a total excess sanction of $46,500, even assuming *no* costs of litigation were involved.

United States v. Mayers — Eleventh Circuit

In *United States v. Mayers,* 897 F.2d 1126 (11th Cir.), *cert. denied,* 498 U.S. 865 (1990), the Court of Appeals remanded in circumstances similar to those present here. There, defendants in a criminal matter asserted the defense of double jeopardy to the criminal charges because the conduct underlying the criminal charges had been the basis for administrative judgments against them under the Civil Monetary Penalties and Assessment Act, 42 U.S.C. § 1320(a)-7a ("CMPAA"), for the filing of false Medicare claims. The defendants had submitted false claims totalling $145,550, but the total civil judgment against them under CMPAA was $1,791,100, an amount arrived at by a formula calling for double damages and an award of $2,000 per false claim. *See Mayers v. United States Dep't of Health and Human Services,* 806 F.2d 995 (11th Cir. 1986), *cert. denied,* 484 U.S. 822 (1987).

When criminal charges were filed against the same defendants, they claimed, citing *Halper,* that the earlier proceeding precluded a second punishment for the same conduct. After the District Court rejected the defense and defendants were convicted, they appealed. The Court of Appeals remanded the matter to the District Court for determination of the "factual issues" regarding whether the conduct underlying the criminal charges was the same as that underlying the civil judgments and whether the civil judgment rose to the level of a punishment because of a "lack of rational relation to the Government's loss." 897 F.2d at 1127. On remand, following a factual *Halper*-type "particularized assessment," the District Court found that the civil penalties outlined above, which exceeded the loss caused directly by the false claims (exclusive of the costs of investigation and prosecution) by $1,645,550, a figure less than the difference between the direct fraud loss here and the False Claims Act judgment, were punitive. It therefore dismissed all of the counts of the indictment which dealt with

the same conduct that had been the basis of the CMPAA proceeding. This holding was subsequently affirmed by the Court of Appeals. *See United States v. Mayers,* 957 F.2d 858 (11th Cir.), *cert. denied,* 504 U.S. 989 (1992).

Thus, *Mayers* represents a dismissal of a second attempt by the Government to sanction a defendant for the same conduct for which he was earlier sanctioned under a law similar in structure to the False Claims Act. It also represents a situation where the Court of Appeals remanded a District Court finding where the court had not made the necessary factual determination as to whether or not the civil judgment constituted a punishment because of a "lack of rational relation to the Government's loss," where the difference between the Government's loss and the nominally civil recovery was less than the approximately $2 million difference here.

United States v. Barnette — Eleventh Circuit

In *United States v. Barnette,* 10 F.3d 1553 (11th Cir.), *cert. denied,* 115 S. Ct. 74 (1994), the Court of Appeals for the Eleventh Circuit reached a decision which simply cannot be reconciled with its decision in *Mayers* and this Court's decision in *Halper.* In that case the Court held that where the Government's claim was that it had suffered direct damages in the amount of $15.7 million, a False Claims Act sanction in the amount of $50 million following a criminal punishment would not violate the Double Jeopardy Clause, even if the Government could show no costs of investigation. The Court did not find that the $35 million difference could be accounted for by the costs of investigation and prosecution to the Government, but that the multiplier applied to a loss of $15 million in order to get to a $50 million recovery would not be comparable to the 220 multiplier present in *Halper.* Since the recovery would be "only" 3.2 times the loss, the Court reasoned, it did not violate *Halper.*

United States v. Williams — Fourth Circuit

In *United States v. Williams,* 1995 U.S. App. LEXIS 13019 (May 30, 1995), the Court of Appeals for the Fourth Circuit found that a criminal prosecution of a mining company for willful violation of 30 U.S.C. §820(d) did not violate the Double Jeopardy Clause despite the entry of a judgment in an earlier civil proceeding under 30 U.S.C. §820(a) in the amount of $300,166. It did so, however, after reviewing the District Court's *Halper*-type inquiry and finding the Government's costs of prosecution were in excess of $160,000 and that therefore the $300,166 civil sanction was less than two times the government's costs. In explaining its decision that even this excess recovery did not violate the Double Jeopardy Clause, the Court noted that unlike the defendant in *Halper,* the mining company was not a "small gauge offender."

United States v. Morgan — Second Circuit

In *United States v. Morgan,* 51 F.3d 1105 (2d Cir. 1995), the Court of Appeals for the Second Circuit permitted a bank fraud prosecution under 18 U.S.C. §1344 and 18 U.S.C. §5657 to proceed notwithstanding a claim that it was brought in violation of the Double Jeopardy Clause because it followed the imposition of a civil sanction by the Office of Thrift Supervision for the same conduct. The Court did so, however, only after reviewing the factual findings of the District Court which had carefully analyzed the civil sanction's size in relation to the damages and found it to be *less* than the damages caused by the defendant. The Second Circuit was following its observation in *United States v. 38 Whalers Cove Drive,* 954 F.2d 29 (2nd Cir.), *cert. denied,* 113 S. Ct. 55 (1992), in which it said, in describing the requirements of *Halper,* that when *Halper* requires an accounting, it requires a District Court "to compare the government's proven damages and costs against the sanction the government seeks to impose." 954 F.2d at 35.

Decisions in United States District Courts have produced wide ranging results.[2]

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2. In *United States v. Fliegler,* 756 F. Supp. 688 (E.D.N.Y. 1990), the Government filed a claim under the False Claims Act for the submission of

4. The Issues To Be Addressed in Applying *Halper*.

The reason courts have applied *Halper* in inconsistent ways is that *Halper*, while it established a clear rule, contains language which the Government and some courts have seized on to limit arbitrarily its application.

The simple proposition that *Halper* establishes is that a *second punishment,* even if nominally civil, violates the Double Jeopardy Clause. All agree that that is what *Halper*

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23 separate false claims. The total amount defrauded from the Government was $260,372 which had already been recovered by the Government in restitution. Under the Act, a civil penalty of between $115,000 or $230,000 could have been imposed as a result of those 23 false claims. The court considered proof submitted by way of affidavits as to the Government's costs and found in accordance with those affidavits that the Government's costs of prosecution were $110,564.90. The court found that the Government's costs bore a rational relation to the lower end of the range of possible penalties, and accordingly it imposed the lower penalty and held that that did not violate the Double Jeopardy Clause.

In *United States v. Pani,* 717 F. Supp. 1013 (S.D.N.Y. 1989), the court held that a $32,460 recovery sought by the Government on three claims (which was equal to three times the amount paid on the false claims, plus $10,000 for each claim, minus $1,380 paid in restitution in the criminal action for those three claims) could not be said to "bear no rational relationship to the goal of compensating the Government for its loss ... considering the expenses of investigation and prosecution." *Id.* at 1019 (citation omitted).

In *United States v. Hall,* 730 F. Supp. 646 (M.D. Pa. 1990), the court disallowed the Government's attempt to collect a $1,035,000 civil penalty under 31 U.S.C. §§ 5316(b) and 5322(b), stating

> Beyond its general assertions concerning the "heavy burden" of investigation and prosecution and the injury to the United States' trade and economic programs, which it characterizes as "impossible to measure, with precise certainty," the Government makes no attempt to quantify the actual losses it has suffered as a result of Hall's criminal misconduct. The absence of such a quantification, when coupled with the disproportionate relationship between the amount of the fine and the damages apparently caused by Hall's conduct, leads the court to conclude that this fine is not rationally related to the goal of making the Government whole. ...
>
> In the instant case, if the court were to allow the Government to impose this fine, without at least requiring some approximation of its actual damages and costs, the court would be sanctioning the very type of "clear injustice" which *Halper* prohibits.

730 F. Supp at 655.

holds. The difficulty comes in determining what is punishment. Confusion has arisen in the application of the rule prohibiting a second punishment, because of the factual circumstances in which the *Halper* case arose.

Halper involved a defendant who defrauded the Government of $585. The False Claims Act recovery sought by the Government was $131,170, comprised of a doubling of the basic fraud loss and an award of $2000 for each of 65 false claims. (Under the False Claims Act, as amended since the *Halper* decision, the recovery would be between $326,755 and $651,755, depending on whether or not the Court chose to impose a $5000 or $10,000 per-false-claim penalty.) In *Halper*, therefore, the double damages aspect of the recovery, or what would now be the treble damages aspect of the recovery, was largely inconsequential, amounting to either an extra $585, in the case of doubling, or $1170, in the case of trebling. The lion's share of the excess award in *Halper* was comprised of the per-false-claim sanction. Under the law applicable in *Halper,* that per-false-claim penalty totalled $130,000. If current law were applied to *Halper,* the per-false-claim penalty would be between $325,000 and $650,000.

Because the factual setting in which it arose involved a small direct fraud loss by the Government, the opinion in *Halper,* dealing naturally only with the case before it, contained language that said it was establishing a rule for the "rare case" of a "small gauge but prolific offender." As such, the opinion did not anticipate many issues that would arise in cases involving larger frauds, where the application of a multiple of two or three would result in the entry of a judgment possibly millions of dollars in excess of the Government's actual loss, even before the addition of any per-false-claim penalty. In such a case, a multiple of two or three would result in the assessment of what anyone would agree is punishment, "in the plain meaning of the word." 490 U.S. at 452. Writing the opinion as it did, the *Halper* Court created a series of questions which have led to disparate results in the lower courts and now require resolution by this Court:

a. Does *Halper*, and the Double Jeopardy Clause, apply only to "small gauge offenders" who defraud the Government of only modest amounts similar to the $585 stolen by the defendant in *Halper*, or does it apply to all persons who have been punished once already for their crimes?

The Government claimed below that the reach of *Halper* is limited to the "rare cases" of "small gauge offenders," (United States' Brief in the Third Circuit Court of Appeals at pp. 15-17), and apparently persuaded the District Court and Court of Appeals that that was so. The District Court's only reasoning in support of its decision was that, "this case is not the 'rare case' of the government subjecting a 'prolific but small gauge offender' to a 'sanction overwhelmingly disproportionate to the damages' caused by defendants." (*See* A-10.)

Some other courts have rejected this argument since they have at least considered the *Halper* test as it applies to persons who defrauded the Government of large sums of money. *See, e.g., United States v. Mayers,* 957 F.2d 858 (11th Cir.), *cert. denied,* 504 U.S. 989 (1992), in which the amount of the fraud was $145,550. Even *United States v. Barnette, supra,* in which the loss was $15 million, purported to apply *Halper.*

Some courts, however, like the District Court here, have rejected double jeopardy claims citing, among other reasons, the "small gauge offender" language of the *Halper* opinion. *See, e.g., SEC v. Bilzerian,* 29 F.3d 689 (D.C. Cir. 1994).

Petitioners' position is that the Double Jeopardy Clause and *Halper's* teaching apply with equal force to large and small offenders. There is no principled basis on which to distinguish between a person who steals $500 and is punished twice in violation of the Double Jeopardy Clause and a person who steals $500,000 and is punished twice in violation of the Clause. Indeed, the various protections of the Bill of Rights are most relevant when needed to protect the rights of unpopular, "large gauge" criminals. The risk that the state would punish a "small-time" criminal twice is small or nonexistent, so the protections of the Double Jeopardy Clause are least needed in that context. It is harder to apply its protections to those the Government, left to its own devices, would

in fact punish twice. As this Court has said, " '[v]iolations of the Double Jeopardy Clause are no less serious than violations of other constitutional protections.' " *Jones v. Thomas,* 491 U.S. 376, 387 (1989) (quoting *Morris v. Matthews,* 475 U.S. 237, 255 (1986) (Blackmun, J., concurring)). If that is so, it is no more proper to condition the application of the Double Jeopardy Clause on a defendant being a small time offender than it would be to condition a person's privilege against self-incrimination or protection from unreasonable searches and seizures on such a status.

Notwithstanding these arguments, however, there is in the eyes of the Government and some courts a question as to *Halper's* and the Double Jeopardy Clause's applicability to large scale offenders. This Court should resolve that issue, because until it does there will continue to be confusion and conflicting results in the courts as to whether or not this Court's double jeopardy teachings apply to all, or only to those who defraud the Government of small amounts.

b. Does *Halper* hold that a sanction is to be considered punitive unless it is 'solely' remedial, or, in the alternative, that a sanction is punitive only if it can be characterized as 'only' a deterrent or retribution?

Another issue on which the *Halper* decision has led to confusion is whether or not *Halper* stands for the proposition that a sanction not *solely* remedial is punitive, or, in the alternative, that unless it is *only* punitive, it is remedial. *Halper* contains passages which have lent support to both interpretations.

In one passage, the Court said:

> It follows that a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

490 U.S. at 448 (emphasis added). Shortly thereafter, however, the Court said:

> We therefore hold that under the Double Jeopardy Clause a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution.

Id. at 448-49 (emphasis added).

In this matter, the Government argued below that the latter passage meant that unless the civil sanction sought was *only* punitive it could not be violative of the Double Jeopardy Clause. (*See* United States' Brief in the Third Circuit Court of Appeals at pp. 17-18 n.12.)

The lower courts have been split as to which view represents the authentic teaching of *Halper*. In *United States v. Hudson, supra,* the Court stated that it understood *Halper* to hold that, "unless a sanction is 'solely' remedial, *i.e.,* not serving deterrent or retributive ends, it is punishment." 14 F.3d at 540. The Tenth Circuit Court of Appeals found that this reading of *Halper* was confirmed by the decision of this Court in *Austin v. United States,* ____ U.S. ____, 113 S. Ct. 2801 (1993), where this Court held that " 'sanctions frequently serve more than one purpose.'. . . However, even if a sanction is remedial, it is still subject to the Excessive Fines Clause if 'it can only be explained as serving in part to punish.' " 14 F.3d at 540 (citations omitted).

This reading of *Halper* has been followed by the Ninth Circuit Court of Appeals as well, *United States v. $405,089.23 U.S. Currency,* 33 F.3d 1210, 1222 (9th Cir. 1994), and in the Second Circuit, *United States v. 38 Whalers Cove Drive,* 954 F.2d at 35. *See also United States v. Morgan, supra.* The District of Columbia Court of Appeals disagrees. *See SEC v. Bilzerian,* 29 F.3d at 696 n.11.

As to the views of the District Court or Court of Appeals here, because the explanations for the decisions were so sparse, Petitioners do not know how they viewed this issue. The Government advanced the argument that since part of the sanction was compensatory, the entire judgment was remedial. It is possible that if either court followed the minority view, this could have served as a basis for the result.

c. Is the *Halper* requirement of an accounting triggered only if the False Claims Act recovery is so much larger than the Government's basic loss that it is a multiple on the order of the 220 multiple present in *Halper*?

The Government contended below that *Halper* is triggered only in cases in which the civil recovery is a huge multiple of the Government's actual loss, akin to the 220 multiple present in *Halper*. The Government characterized the multiple in this case as "only" 4.65 times its actual damages. (*See* United States' Brief in the Third Circuit Court of Appeals at p. 18.)

In *Halper* itself, this Court did not follow a multiple approach. It suggested that the correct approach to use was a comparison of the absolute difference between the civil claim and the damages. In *Halper*, the absolute difference between the False Claims Act recovery and the direct fraud damages was approximately $130,000. The District Court in *Halper* had estimated the Government's costs at $16,000 and therefore the difference between the False Claim Act liability and that figure was $114,000. 490 U.S. at 452. The Court remanded to allow the Government to submit evidence as to its costs, but as it did so, stated that it agreed with the District Court, "that the disparity between its [$16,000] approximation of the Government's costs and *Halper's* $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy." *Id.* Thus, the Court explicitly approved a comparison of the actual costs with the asserted liability.[3]

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3. Entirely apart from whatever may be drawn from the *Halper* opinion itself, the Government's position is nonsensical. Logically, the multiple approach provides no consistent answer to the inquiry. If a 200 multiple is too high, as the Government would presumably admit, what multiple is acceptable? 100? 50? 25? If the inquiry is to determine whether or not proposed recovery roughly approximates the actual costs to the Government, the "multiple" approach is clearly unworkable. In a case involving a fraud of a small amount, such as where the Government is overbilled by $500, it is possible to envision costs of $25,000, $50,000, or more being incurred by the Government, in a case of a prolonged investigation or an obstructive defendant. If those costs were proven, what would appear to be an extremely high multiple of the direct loss of $500 may be entirely reason-

The lower courts have been confused on this subject. As noted above, in *United States v. Barnette, supra,* the Circuit Court held that in a case where the Government's claim was that it had suffered direct damages in the amount of $15.7 million, a False Claims Act sanction in the amount of $50 million following a criminal punishment would not violate the Double Jeopardy Clause, even assuming *no* costs of investigation, since the recovery was "only" 3.2 times the loss. Other courts have seemingly compared absolute dollar amounts in applying *Halper*, as opposed to figuring multiples. *See United States v. Mayers,* 957 F.2d 858 (11th Cir.), *cert. denied,* 504 U.S. 989 (1992).

As with the other issues, due to the lack of any explanation, Petitioners cannot say if the courts below in this case felt that because the recovery is "only" 4.65 times the loss, notwithstanding the absolute difference of approximately $2 million, it was within the limits of *Halper.* It is possible that the District Court meant to express this notion when it wrote, "I conclude that the $2,344,530.94 sought by the Government bears a rational relationship to the goal of compensating the Government for its loss." (*See* A-10.) The obscurity of its reasoning is but another manifestation of the confusing state of the law surrounding *Halper.*

d. In doing a *Halper* accounting should the District Court compare the amount of the proposed sanction to the costs of the Government in investigating and prosecuting the specific defendants in question or to the costs

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able. Alternatively, if a case involved the prosecution of a fraud involving a large sum and several hundred separate false claims, such as an over-billing of $2,000,000, it could involve modest costs of, say, $50,000, if the crime, once discovered, was relatively easy to prove or where, as here, a guilty plea is entered. In such a case, the recovery under the False Claims Act could be as high as $9,300,000 — not an unlikely result in such a case ($2,000,000 trebled equals $6,000,000, plus $10,000 times 330 false claims) — before it would exceed a multiple of 4.65, the one imposed in this case. Measured against the $2,050,000 total loss and costs to the Government, such a recovery is patently punitive. Under the approach suggested by the Government, however, that recovery would not be punitive regardless of the absolute amount of the difference between the actual loss and the recovery!

to the Government of investigating and prosecuting the type of conduct of which the defendants were convicted?

Under the practice envisioned in *Halper* to address double jeopardy claims, the District Court must compare the recovery sought by the Government to its direct losses and its costs of investigation and prosecution. As explained above, many Courts of Appeals have required such a comparison.

Here, the Government contended that measuring such costs is "virtually an impossible task." It alluded to "general costs of maintaining investigative fraud units or the harm to the integrity of the contracting process" and says that such costs are "probably not quantifiable." (*See* United States' Brief in the Third Circuit Court of Appeals at p. 15.) Implicit in these statements is the argument that the *Halper* equation, on the Government cost side, includes general law enforcement costs.

Petitioners believe that the costs to be considered in a *Halper* analysis are the costs incurred because of the conduct of the defendant before the court and not costs incurred by the Government due to *all* defendants charged with similar offenses. Nowhere in any of the cases applying *Halper*, have the courts ever considered general expenses of the government in the nature of the costs of law enforcement or the societal costs associated with conduct of the type engaged in by the defendants as costs for purposes of a *Halper* type analysis.

In fact, the Court's opinion in *Kurth Ranch, supra,* holds to the contrary. There, the Court emphasized that the costs which must be measured against the recovery of the government are "actual costs" arising from the "defendant's conduct." 114 S. Ct. at 1945. The Court characterized *Halper* as recognizing that a civil penalty may follow a criminal prosecution "as a remedy for *actual* costs to the State that are attributable to the *defendant's* conduct." 114 S. Ct. at 1948 (emphasis added). Indeed, including general law enforcement costs in a *Halper* analysis would render *Halper* meaningless, for the

Government's costs of that type would always dwarf an individual False Claim Act recovery. It would even have done so in *Halper* itself.

Once again, Petitioners are not able to state whether or not the District Court or Court of Appeals believed the Government's position in this regard was correct. One can only speculate that when the District Court made the unexplained observation that the loss had a "rational relationship to the goal of compensating the Government for its loss," it may have been influenced by this argument.

e. Does the *Halper* rule apply to the treble damage provision of the False Claims Act?

Although no court has so ruled, the Government contended below that *Halper* does not apply to the treble damage aspect of a False Claims Act recovery, but only to the per-false-claim "penalty" portion of the claim — the portion which imposes a $5,000 to $10,000 recovery for each false claim. (*See* United States' Brief in the Third Circuit Court of Appeals at p. 16-17 n.10.)

Without addressing it explicitly, other courts have appeared to reject that reasoning. None of the cases cited herein in which lower courts have made the "particularized assessment" required by *Halper* have viewed their task as limited only to the fixed sum penalty portion of the civil statute involved. To the contrary, all of them have calculated the amount due to the Government under the recovery formula in its entirety, both multiple and fixed sums, and have made an assessment of the Government's damages against that total figure.

Petitioner's position is that the comparison must be made with the entire recovery. Reading *Halper* to require only a comparison of the per-false-claim part of the recovery would be completely inconsistent with its reasoning, which recognizes that the imposition of any punishment for conduct following the imposition of a criminal sanction for the same conduct in a separate proceeding violates the Double Jeopardy Clause. Punishment is punishment, of course, whether it

comes in the form of a multiple of the actual damages or is imposed as a "per criminal act" penalty, assessment, or, as in *Kurth Ranch*, a "tax."

That this is so is illustrated by this very case. The judgment here exceeds the Government's damages by approximately $2 million. Approximately $1 million of that excess results from the trebling and $1 million from the per-false-claim penalty. There is no reason to attach any significance for double jeopardy purposes to the fact that one-half of the $2 million excess is caused by trebling as opposed to a per-false-claim charge.

That simple treble damages are at least in part punitive in nature is also consistent with decisions of this Court which have frequently observed the same, holding, for example, that such damages in the antitrust context, "play an important role in penalizing wrongdoers and deterring wrongdoing," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977), and that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct," *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

If, as this Court observed, "[t]he very idea of treble damages reveals an intent to punish," *id.*, then an award of treble damages, with an extra million dollars of per-false-claim penalties added in for good measure, which together amount to an award of approximately $2 million in excess of the Government's loss, at a minimum "appears" to be punishment.[4]

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4. The Third Circuit also ignored one of its own decisions, *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (1991), in which it held, albeit not in a double jeopardy context, that treble damages under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et. seq.* ("RICO"), were punitive in nature. *See* 937 F.2d at 912. How the same court could make such a decision and not require an accounting under the *Halper* "rule of reason," which requires one where the civil sanction sought "*appears* to qualify as 'punishment' in the *plain meaning of the word*," 490 U.S. at 449 (emphasis added), is a mystery.

Petitioners note the inconsistency between two decisions of the Third Circuit Court of Appeals not because they suggest that such an inconsistency itself warrants issuance of a writ of certiorari, but only to underscore

Moreover, the language employed by the Court in *Halper* lends no support to the Government's argument. The opinion uses the term "civil sanction" to refer to the total award, the impact of which must be assessed in accordance with the particularized assessment procedure set up in *Halper*. This clearly includes both the multiple damages and the per-false-claim recovery. *See* 490 U.S. at 438 ("Although the court recognized that the statutory provisions for a *civil sanction* of $2,000 *plus* double damages for a claims violation was not in itself criminal punishment, it concluded that this civil remedy, designed to make the Government whole, would constitute a second punishment for double jeopardy analysis.") (emphasis added).

The Court used this broad term of "civil sanction" when it held, "it follows that a *civil sanction* that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional *civil sanction* to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49 (emphasis added). Nothing said there or elsewhere in the Court's opinion suggests that this use of the term "civil sanction" is limited in some sense to the fixed sum penalty per violation; in fact, the opposite meaning is clear from the discussion of the District Court's ruling.

As with the other positions taken by the Government, Petitioners do not know if this one was credited by the Courts below.

5. The Need for Clarification of the Meaning of *Halper*.

The difficulty with the present state of the law is that the first three of the foregoing questions are answered differently by different courts, often with little or no explanation. As to the two latter questions, although no support exists for the

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the degree to which the Court's decision reflects the confusion over the reach of *Halper*.

Government's position, it is possible that the lower courts here did give some credence to those positions.

The result of the confusing array of authorities as to the meaning and application of *Halper* is results like that in this case, which, Petitioners respectfully suggest, cannot be harmonized with the basic principle announced in *Halper* and reiterated in *Kurth Ranch.*

As noted above, the difference here between the damages sustained by the Government and the False Claims Act liability is approximately $2 million, a figure hugely exceeding the $114,000 estimated disparity in *Halper* found by the Court to be so disproportionate as to demonstrate that the recovery there was punitive, *see* 490 U.S. at 452, and the $181,000 disparity between the "tax" and the Government's losses found to be disproportionate in *Kurth Ranch.*

Yet, *Halper* and *Kurth Ranch* notwithstanding, the District Court and Court of Appeals declined to require any review of the Government's costs over and above the $504,000 that it claimed in actual damages. Put bluntly, beyond some cosmetic lip service, the District Court and the Court of Appeals ignored any analysis of the facts of the case to determine whether or not, as applied to this case, the False Claims Act sanction was punitive. There was *no* evidence in the record by which the court could form any conclusion that the $2 million difference between the False Claim Act liability it found and the Government's loss could be explained by the Government's costs of investigation and prosecution.

The Court of Appeals must have concluded not only that a False Claims Act judgment $2 million in excess of the actual damages suffered by the Government from the defendants' conduct was not a punishment, but also that the judgment does not even *appear* to be a "punishment." This must be so because *Halper* held that if a civil penalty "appears to qualify as 'punishment' in the plain meaning of the word," 490 U.S. at 449, then the Government is required to make an accounting of its costs. Because the Court did not require an accounting, it must have been of that view.

Because it affirmed by Judgment Order, the exact reasoning of the Court of Appeals in affirming the District Court's

decision is unknown. Assuming that it meant to adopt the reasoning of the District Court as expressed in its opinion, that reasoning is flawed because, while it gives lip service to the holding of *Halper*, it does not make any attempt to apply its "rule of reason." It merely asserts, without any explanation or factual analysis, that Petitioners' position ignores the Government's costs of investigation and prosecution. (*See* A-7.)

Alternatively, if one does not assume that the Third Circuit intended to adopt the District Court's opinion as its own, the affirmance can be explained only if one assumes the Court of Appeals found one or more of the following things:

- The rule set down in *Halper* does not apply to this case because Defendants here defrauded the Government of $500,000, far more that the $585 stolen by Dr. Halper.

- Since part of the False Claims Act judgment is compensatory — the part in excess of the $300,000 already paid in restitution necessary to compensate the Government for its $504,000 loss — the judgment is not "only" punitive and therefore *Halper* does not apply.

- The 4.65 multiple of the Government's actual damages represented by the judgment — despite the $2 million absolute difference between the judgment and the damages — was insufficiently large to trigger application of *Halper*.

- The $2 million excess was less than the cost to the Government of maintaining the investigatory resources necessary to combat defense contracting fraud of the type defendants committed.

- The $1 million portion of the judgment imposed under the treble damage part of the False Claims Act is not subject to *Halper* and the remaining $1 million portion of the excess judgment is acceptable under *Halper*.

If the Court of Appeals believed any of these things, then, for the reasons set forth in each of the corresponding sections dealing with these issues above, Petitioners believe that it was

mistaken because none of those reasons is consistent with the basic rule laid down in *Halper*, nor with the cases that have applied *Halper* correctly.

CONCLUSION

Petitioners have explained in this Petition that there are several issues regarding the application of *Halper* which have not been addressed by this Court and which, if *Halper* is to be followed in a consistent and analytically coherent fashion, should be addressed by this Court. As it stands now, these issues are being addressed indirectly and in an obfuscated manner that is producing results which are at odds with the meaning of *Halper* and *Kurth Ranch*. At the very least, the Court's opinions in those cases are being interpreted in ways which were not foreseen by the Court when it wrote them.

If, as Petitioners believe, the resolution of those issues should be as Petitioners would argue on the merits, then the Court should grant certiorari to reverse the Court of Appeals for the Third Circuit on the ground that it has entered a decision which is inconsistent with the decisions of this Court and those decisions of the Courts of Appeals which support Petitioners' positions on the various issues.

If this Court is uncertain as a result of this Petition that the issues raised herein were correctly addressed by the Third Circuit, then there is even more reason to grant certiorari to address those questions in a meaningful way so that courts will have instruction as to how they should follow and apply the teaching of *Halper*.

As Justice Scalia noted in his dissent in *Kurth Ranch*, at least in his view, the Court has been, "unwilling to take the strong (and not particularly healthful) medicine that [it] poured out for [itself] in *Halper*." *Kurth Ranch*, 114 S. Ct. at 1958 (Scalia, J., dissenting). He expressed the view that the Court should overrule *Halper*. Not only would that correct what is in his view a mistaken conclusion that multiple punishments violate the Double Jeopardy Clause, it would prevent the difficulty of reconciling results like that in the instant case and in *Barnette* with the principles announced in *Halper*.

Petitioners respectfully contend that such results have more to do with the feeling that defendants who steal from the Government should suffer the full penalties envisioned by Congress, the Double Jeopardy Clause notwithstanding, than they do with any principled adherence to *Halper*. In this respect, the situation present here is similar to that developing in the closely related area of the effect of the Double Jeopardy Clause on civil forfeiture claims and associated criminal prosecutions. *Compare United States v. $405,089.23 U.S. Currency,* 33 F.3d 1210 (9th Cir. 1994), *with United States v. One Single Family Residence,* 13 F.2d 1493 (11th Cir. 1994). Some courts have followed the teaching of *Halper* and a related forfeiture case, *Austin v. United States,* __ U.S. __, 113 S. Ct. 2801 (1993), where they have led and found that some nominally civil forfeiture statutes are punitive and thereby implicate the Double Jeopardy Clause. At least some of the objection to such holdings is explainable by a desire to simply avoid the results. Perhaps the clearest example of this sentiment is found in *United States v. $405,089.23 U.S. Currency, supra,* in which seven members of the Ninth Circuit Court of Appeals took the extraordinary step of joining in an opinion dissenting from the denial of rehearing. In that opinion, the dissenting members of the Court lamented that the result of the Court's decision in that case, which found that a civil forfeiture statute frequently used in connection with drug prosecutions was punitive and that its use against an accused drug dealer therefore barred a subsequent prosecution, "could free hundreds of drug dealers," and that therefore such a result, "cannot be right." *See United States v. $405,089.23 U.S. Currency,* 1995 U.S. App. LEXIS 12946 (May 30, 1995) (dissenting opinion on denial of rehearing). Those members of the Ninth Circuit Court of Appeals believe, Petitioners respectfully suggest, that the basic holdings of *Halper, Austin* and *Kurth Ranch* should simply not go so far. In that respect, they perhaps share Justice Scalia's view that "[i]t is time to put the *Halper* genie back in the bottle." 114 S. Ct. at 1959.

If the result in the instant case can be explained by the Third Circuit's agreement with that view, it has overstepped its bounds. There is no indication, in view of this Court's recent

reaffirmance of *Halper's* teaching in *Kurth Ranch,* that *Halper's* authority is in any way suspect. That being so, this Court should reaffirm its holding again and give the guidance necessary to permit it to be uniformly applied, in a manner consistent with its basic principles.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1725

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION; GERALD KRESS; ROBERT ALLEN BAXTER,

Educational Development Network Corporation and Gerald Kress,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 89-cv-07780)
District Judge: Hon. Thomas N. O'Neill, Jr.

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 11, 1995

Before: COWEN, NYGAARD and ALITO, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered June 17, 1994, be and is hereby affirmed. Costs taxed against appellants.

ATTEST: By the Court,

P. Douglas Sisk, Clerk
Dated: JAN 23 1995

CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	
	:	
EDUCATION DEVELOPMENT NETWORK, INC., et al.	:	No. 89-7780

MEMORANDUM

O'Neill, J. : December 20, 1993

I. Introduction

Currently before the Court are motions for summary judgment filed by plaintiff United States of America and defendants Gerald Kress and Educational Development Network, Inc., ("EDN").[1]

Plaintiff is proceeding under the False Claims Act, 31 U.S.C. § 3729 *et seq,* and alleges that it suffered approximately $500,000 in damages as a result of defendants' fraudulent conduct in the negotiation of two contracts with the Army National Guard. On June 18, 1993, the government filed a motion seeking summary judgment against defendants in the amount of $2,344,530.94. Defendants responded with cross-motions seeking the entry of summary judgment in their favor. After oral argument and for the following reasons, I will grant plaintiff's motion and enter judgment against defendants in the amount of $2,344,530.94.

II. Procedural History

Kress was the sole shareholder and president of EDN, a Pennsylvania corporation, which provided educational and

1. Lieutenant Colonel Robert Allen Baxter, chief of the Recruiting and Retention Management Center for the Army National Guard, is the other defendant in this action. He is not a party to any motion currently before the Court.

training materials and programs, including a program known as the Career Planning Workshop, to the Army National Guard in connection with its high school recruitment program. Under a series of contracts with the Department of Defense, EDN furnished the Workshop to the Guard from 1981 through 1986.

During the period relevant to this dispute, defendants were paid by the government under two fixed price "sole source" contracts.[2] In September 1983, the parties signed a contract for a total of $1,341,900; a year later, the parties signed another contract for $1,435,700. The later contract included an option, which the Guard exercised in 1985 for $1,521,124 and in 1986 for $1,611,631.

EDN and Kress engaged in a scheme to defraud the government by submitting false and inflated estimates of the costs of EDN's materials. In July 1988, a federal grand jury indicted EDN and Kress on thirteen counts of mail fraud, twenty-one counts of submitting false claims to the government in connection with two contracts and twenty counts of submitting false statements to the government. In addition, Kress was charged with five counts of paying illegal gratuities to a public official, Baxter, who was charged with five counts of receiving illegal gratuities. *See* Indictment, *United States of America v. Educational Development Network Corp. et al.*, Cr. No. 88-271, filed July 13, 1988.

On November 29, 1988, defendants EDN and Kress entered guilty pleas to all charges of submitting false claims to the government and paying illegal gratuities to a government official.[3] Thereafter, United States District

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2. A sole source contract is a contract in which the private contractor does not compete with other contractors in an invitation to bid. *See* Complaint at ¶.11.

3. Defendants Kress and EDN entered conditional guilty pleas and subsequently challenged the government's use of subpoenas issued by the Department of Defense Inspector General. Defendants' challenge did not succeed. *See United States v. Educational Development Network Corp.*, 884 F.2d 737 (3d Cir. 1989), *cert. denied* 494 U.S. 1078 (1990). After trial, Baxter was found guilty of receiving illegal gratuities.

Judge Raymond J. Broderick sentenced Kress to imprisonment for one year and one day and Kress agreed to pay $300,000 in restitution.[4] The Court also fined EDN $100,000 and imposed a special assessment of $4,800.

On October 31, 1989, plaintiff initiated this civil suit against defendants. Under the False Claims Act, any person who

> knowingly presents, or causes to be presented to an officer or employee of the United States Government or a member of the Armed Forces of the United States false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, . . . A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

31 U.S.C.A. § 3729 (a) (Supp. 1993).

Because of their guilty pleas, defendants are collaterally estopped from challenging liability in the civil suit. As Judge Ditter explained in *United States v. Kates,* 419 F.Supp. 846 (E.D.Pa. 1976), the doctrine of collateral estoppel "in general applies to both civil and criminal proceedings . . . and in particular applies in suits brought under the False Claims Act to preclude relitigation of matters previously determined by a criminal conviction." *Id.* at 850 (citations omitted). When applying the doctrine, the court must examine the record developed by the parties and determine what questions were " 'distinctly put in issue and directly determined' in the criminal prosecution." *Id.* at 851, quoting *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 558, 569 (1951).

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4. Judge Broderick also sentenced Kress to perform community services during the five years of his probation and imposed a special assessment of $50 per count for a total of $1,400. In June 1989, Judge Broderick reduced Kress' period of imprisonment to four months.

III. Discussion

A. Summary Judgment Standard

Under Fed.R.Civ.P. Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Hines v. Conrail,* 926 F.2d 262, 267 (3d Cir. 1991).

Under Rule 56, summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 322-323. The moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

If the moving party sustains this burden, the non-moving party must set forth facts demonstrating the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Rule 56(e) provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for

the nonmoving party." *Anderson,* 477 U.S. at 255; *Brenner v. United Brotherhood of Carpenters & Joiners,* 927 F.2d 1283, 1287-88 (3d Cir. 1991).

In addition, "the existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.' " *Ely v. Hall's Motor Transit Co.,* 590 F. 2d 62, 66 (3rd Cir. 1978), quoting *Smith v. Pittsburqh Gage & Supply Co.,* 464 F.2d 870, 874 (3rd Cir. 1972).[5]

B. *United States v. Halper*

Defendants assert that the amendments to the damages provision demonstrate that the False Claims Act is punitive rather than remedial. The damages provision, which originally provided for an award of double damages and a penalty of $2,000 per false claim, now allows for an award of treble damages and a penalty of between $5,000 and $10,000 per false claim. According to defendant, the intended deterrent and punitive effect of these provisions, as evidenced by the legislative history of the amendments, demonstrates that the civil False Claims Act is punitive.

Defendants reason that, given the punitive quality of the Act's damages provisions, allowing the government to proceed with a civil suit in this case would expose defendants to a second punishment and therefore violate their constitutional rights against double jeopardy.

During oral argument, counsel for defendants asserted that recent Supreme Court cases addressing the legality of criminal and civil proceedings against the same defendant supported two positions. First, he asserted that the government was obligated to pursue all of its civil and criminal claims against the same defendant in the same proceeding. *See* Hearing Transcript at 91, August 12, 1993. If counsel is correct, then the government's civil suit against EDN and Kress is invalid and summary judgment in favor of the defendants is appropriate.

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5. *See also United States v. Hall,* 730 F.Supp. 646, 649 (M.D.Pa. 1990) (setting out standard for deciding cross-motions for summary judgment).

Alternatively, counsel suggested, even if the government may pursue its claim for damages in a civil proceeding after a criminal proceeding, it may only collect that amount of money necessary to compensate it for the actual damages it sustained. *Id.*

In this case, the government has estimated its damages at $504,376.98. According to his counsel, because Kress paid $300,000 in restitution in the criminal proceeding against him, Kress now owes the government only $204,376.98. Any payment more than that, counsel asserts, constitutes punishment.

I reject defendants' arguments as I believe their reading of relevant Supreme Court precedents ignores the cost to the government of detecting and punishing illegal activity. Their reading also requires an unwarranted restriction of how the government pursues the dual goals of punishing illegal activity and compensating itself for the damages incurred by that illegal activity. Not surprisingly, defendants' position has not been accepted by lower courts applying those precedents.

The parties agree that *United States v. Halper,* 490 U.S. 435 (1989), is central to evaluating defendants' constitutional arguments. In *Halper,* the government indicted Irwin Halper on 65 counts of submitting false claims. As a result of Halper's fraudulent conduct, the federal government overpaid a total of $585 on those 65 claims. *Halper,* 490 U.S. at 437.[6]

Halper was convicted on all 65 counts, as well as on 16 counts of mail fraud, and was sentenced in July 1985 to imprisonment for two years and fined $5,000. *Id.* Subsequently, the government initiated a civil False Claims Act case against Halper. Although the district court granted summary judgment for the government on the issue of liability, it concluded that "the statutorily authorized penalty of $130,000, an amount more than 220

6. "Halper mischaracterized the medical service performed by New City [his employer], demanding reimbursement at the rate of $12 per claim when the actual service rendered entitled New City to only $3 per claim." *United States v. Halper,* 490 U.S. 435, 437 (1989).

times greater than the Government's measurable loss, qualified as punishment, which, in view of Halper's previous criminal conviction and sentence, was barred by the Double Jeopardy Clause." *Id.* at 439-440. The United States appealed directly to the Supreme Court.

In its legal discussion, the Court stated that proceedings and penalties under the civil False Claims Act are "indeed civil" and do not constitute punishment "merely because Congress provided for civil recovery in excess of the Government's actual damages. . . ." *Id.* at 442. After reviewing three earlier Supreme Court decisions concerning the relationship between criminal and civil penalties, the Court held that the government

> is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis.

Id. at 446.[7]

The Court noted that under certain circumstances a civil penalty may constitute punishment. Specifically, it stated that "the Government may not criminally prosecute a defendant, impose a civil penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." *Id.* at 451.

However, the Court expressly limited the reach of its holding. It stated:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages

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7. Congress amended the civil False Claims Act in 1986 to increase the civil penalty from $2,000 to not less than $5,000 and not more than $10,000" and from double damages to treble damages. *See* Pub. L. 99-562, 100 Stat. 3153.

> he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relationship to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

Id. at 449-450.

The Court declined to establish precise rules for determining when and whether a civil sanction constituted punishment prohibited by the Double Jeopardy Clause, reserving that task for district court judges and directing them to conduct an accounting of the Government's damages and costs to determine the "size of the civil sanction the Government may receive without crossing the line between remedy and punishment." *Id.* at 449-450.

The Court concluded by agreeing with the district court "that the disparity between its approximation of the Government's costs and Halper's $130,000 liability is sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy." *Id.* at 452. It nevertheless remanded the case to the district court to allow the government to prove that the trial court's assessment of the government's injuries was incorrect.

After *Halper,* a number of district courts followed the Supreme Court's instruction to provide "particularized determination" as to whether awarding the government damages in a civil suit constitutes punishment. According to my review of district courts applying *Halper,* the government has never been prevented from collecting either its damages or a civil penalty in civil proceedings following a criminal proceeding so long as it demonstrates a rational relationship between the government's costs and its damages. *See, e.g., United States v. Fliegler,* 756 F.Supp. 688 (E.D.N.Y. 1990) (granting summary judgment in favor of government after finding rational relationship between $115,000 civil penalty and government's

costs of $110,564.90; in preceding criminal case, defendants were ordered to pay restitution of $260,372); *United States v. Pani,* 717 F.Supp. 1013 (S.D.N.Y. 1989) (defendant's guilty plea in criminal case established liability for judgment of $32,460 in subsequent civil suit; amount was based on treble damages and $10,000 penalty per claim, for three false claims totalling $1,280); *United States v. WRW Corporation,* 731 F.Supp. 237 (E.D.Ky. 1989).[8]

After reviewing the record developed by the parties, I believe that the government may collect more than the $204,376.98 that defendants concede they owe the United States. In my view, this case is not the "rare case" of the government subjecting a "prolific but small-gauge offender" to a "sanction overwhelmingly disproportionate to the damages" caused by defendants. I conclude that the $2,344,530.94 sought by the government bears a rational relationship to the goal of compensating the government for its loss.

C. Excessive Fine Clause

Citing a recent Supreme Court case, *Austin v United States,* 113 S.Ct. 2801 (1993), defendants contend that the judgment sought by the government in this case constitutes an excessive fine. In *Austin,* the Court held that civil forfeiture of property could, in extreme circumstances, violate the excessive fines clause of the Constitution. I agree with the govern-

8. In *United States v. Hall,* 730 F.Supp. 646 (M.D.Pa. 1990), the court denied the government's motion for summary judgment because it held that the government's attempt to assess a civil penalty on a defendant who entered a guilty plea to charges of currency reporting offenses violated the terms of the plea agreement. Moreover, the court noted that the government failed to submit information approximating its costs, preventing the court from assessing whether the fine requested would have violated defendant's constitutional right not to be placed in jeopardy twice. The court concluded: "Accordingly, even if Hall were not entitled to summary judgment based upon the Government's violation of the plea agreement, the best result the Government could expect from this court would be that both motions would be held in abeyance pending the submission by the Government of an approximation of the costs incurred and the damages suffered as a result of Hall's criminal conduct." *Id.* at 655.

ment that *Austin* is not relevant to the disposition of this case because that case involved an in rem forfeiture of property under the drug forfeiture laws.

Defendants also cite *Austin* to support their assertion that the amendments to the False Claims Act, previously referred to, render the statute punitive rather than remedial. I do not agree. First, because the Supreme Court was aware of the amendments to the False Claims Act when it decided *Halper,* see *Halper* at 438 n.3, it could have expressed in that case a concern that the amendments were punitive. Second, *Austin,* like *Halper,* is not a sweeping decision — it merely holds that in extreme circumstances the government's efforts to secure a civil judgment may constitute an excessive fine. Moreover, the Court notes that a "fine that serves purely remedial purposes cannot be considered 'excessive' in any event." *Austin v. United States,* 113 S.Ct. at 2812 n.14. In my view, the award sought by the government is remedial — therefore, the award is not "excessive" under *Austin.*

D. Estoppel

1. The Sentencing Hearing

Defendants present four estoppel arguments in their response to the government's motion for summary judgment. Before I address those arguments, I will determine whether the parties reached an agreement to settle all of the government's claims against defendant when Kress entered his guilty plea before Judge Broderick in 1989.

The parties agree that prior to defendants' sentencing before Judge Broderick, defendants met with government attorneys representing the civil and criminal divisions of the United States Attoney's office. They also agree that those meetings did not produce a global settlement among the parties.

Near the beginning of the sentencing hearing, defendant's counsel noted that the parties had not reached a

global settlement.[9] Asked by the Court to estimate the government's losses as a result of defendants' conduct, counsel for the United States stated that he estimated the loss at approximately $501,000.[10] Counsel for defendants stated that they estimated the government's loss at about $100,000. *See* Transcript of Sentencing of EDN and Gerald Kress, Criminal Action No. 88-271-01-02, March 14, 1989, at 12-13.

Subsequently, Judge Broderick stopped the proceedings to allow the parties to discuss restitution.[11] During the recess, counsel for the United States and for Kress agreed to $300,000 as restitution.

After the recess, counsel for the government stated: "the government and defendant agree that for purposes of settling the dispute over criminal restitution today, that three hundred thousand dollars would be an appropriate amount. Speaking for the government, let me say that of course, the government believes the actual damages exceed that number." *Id.* at 34.[12]

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9. Mr. Magarity stated: "We have not been able to agree on a global settlement . . . They are going to be filing a civil suit. We have not been able to come to an agreement as to restitution and civil settlement in a global sense." *See* Transcript of Sentencing of EDN and Gerald Kress, Criminal Action No. 88-271-01-02, March 14, 1989, at 11-12.

10. The government was represented by an Assistant United States Attorney from the criminal division; the Assistant United States Attorney from the civil division who attended the settlement negotiations did not participate in the sentencing hearing.

11. Judge Broderick stated: "Now, I do think at this time, we ought to take at least a ten-minute recess to see if there can be an agreement between Mr. Kress and the government as to the amount of the government's loss for the purposes of restitution, because at the rate this is going so far, I don't know whether the amount of the restitution is going to go up or going to go down." *See* Transcript of Sentencing at 31. He added: "If there is not agreement on restitution, frankly, I think I should take testimony. I don't know, unless you and the government agree that we should not consider restitution at all and all the eggs should be put in one basket; let civil action proceed." *Id.* at 32.

12. During his plea on behalf of Mr. Kress, counsel stated: "We have agreed to pay three hundred thousand dollars back. We disagree on num-

Later, counsel for defendants stated, "Your honor is aware we have come to an agreement on restitution, disputed disagreement somewhat and I apologize for taking as much time as it did. I hope it ends up being a global settlement but we did that because we had some important things to say to your Honor and we think we have said them." *Id.* at 75-76.

After the sentencing hearing, counsel for defendants executed an affidavit stating that he believed the agreement reached during the hearing constituted "full settlement of all outstanding claims of money due the government from Mr. Kress and EDN, both criminal and civil." *See* Affidavit of Gregory T. Magarity, December 20, 1989, attached as Exhibit A to Defendants' Appendix of Exhibits.[13] Counsel for the government in the criminal case has submitted an affidavit challenging defendant's assertion that a "global settlement" was reached at defendant's sentencing.[14]

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bers but that's advocacy. We could spend days." *See* Transcript of Sentencing at 83.

13. In his affidavit, counsel for defendants states: "During the sentencing hearing on March 14, 1989, I represented to the Court that we had been unable to reach on agreement on restitution with the government, although we had been trying for over a month to negotiate a global settlement of all the government's claims. Judge Broderick was informed that the government believed the restitution amount to be approximately $501,000 and that the government intended to file a related civil lawsuit. Government attorneys did not, however, submit any evidence or accounting testimony to prove their claims . . . During the ten minute recess then announced by the Court, Mr. Dobkin [the Assistant United States Attorney from the Criminal Division] and I again attempted to agree to a stipulated amount of restitution to settle all claims and avoid a hearing. As a result of our discussions, both sides made concessions in an equal amount, agreeing to stipulate to a total restitution amount of $300,000. It was our clear understanding that this amount was in full settlement of all outstanding claims of money due the government from Mr. Kress and EDN, both criminal and civil. Neither Mr. Kress not I would have agreed to the additional $200,000 if that were not the clear understanding . . ." *See* Affidavit of Gregory T. Magarity, December 20, 1989, attached as Exhibit A to Defendants' Appendix of Exhibits.

14. He states: "Mr. Magarity and I never discussed the government's civil claims against the defendants and no one from the Civil Division participated in our discussions. I never advised Mr. Magarity, Ms. Ezold [defen-

I conclude that there was no agreement between the United States and defendants to settle all of the government's claims against Kress. First, there is no evidence, such as a written agreement, demonstrating that the government agreed to such a settlement.[15] Second, during the sentencing, counsel for defendants suggested that the settlement may not have resolved all of the government's claims against his clients.

2. Defendant's Res Judicata/Estoppel Claims

Defendants present four different theories to support their assertion that the government is estopped from proceeding against defendants in this civil suit because of the earlier criminal proceeding. I reject all of their arguments.

a. Res Judicata.

Res judicata "refers to the distinctive effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.' " Charles Alan Wright et al., 18 Federal Practice and Procedure (1981), § 4402 at 6. As the authors explain, the

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NOTES *(Continued)*

dant's lawyers] or Mr. Kress that the government was settling all of its claims against the defendants or that there would be no subsequent civil lawsuit. Moreover, neither Mr. Magarity nor Ms. Ezold ever advised me that they understood that the $300,000 was in full settlement of all of the government's outstanding claims against defendants Kress and EDN. Indeed, in light of our past discussions, I believe it was clear to everyone that the government's civil claims were never a part of the ultimate stipulation as to criminal restitution... Furthermore, it has always been my understanding that, as an Assistant United States Attorney in the Criminal Division, I do not have authority to settle the government's civil claims and I never tried to do so in this case.... I never indicated to the Court [during the sentencing hearing] that the $300,000 was in total satisfaction of all the government's claims, both criminal and civil, nor did anyone else. The parties never executed any written settlement agreement or release of the government's civil claims." *See* Affidavit of Leon J. Dobkin, June 15, 1993, attached as Exhibit O to Plaintiff's Motion.

15. Although Judge Broderick may have been under the impression that a global settlement had been agreed to, *see, e.g.,* Transcript of Sentencing at 36, I am unable to conclude that such an agreement was made.

doctrine of res judicata refers to two different effects of judgments: "The first is the . . . foreclosing of any litigation of matters that never should have been litigated, because of a determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have been litigated and decided." *Id.*

Defendants contend that the government relies upon the same cause of action in its civil suit that it pursued in the criminal case and that Kress' agreement to pay $300,000 in the criminal case settled all of the government's damages claims against defendants. They note that, in litigation over the amount of interest Kress was obligated to pay, the government benefitted from the court's characterizing payments under the Victim and Witness Protection Act ("VWPA")[16] as compensatory. *See, e.g., United States v. Kress,* 944 F.2d 155, 159, 160 (3d Cir. 1991), *cert. denied* 112 S.Ct. 1163 (1992). Accordingly, defendants reason that the government's damages claims are foreclosed by their decision to accept $300,000 in restitution.

However, defendants do not cite any cases in which the United States was foreclosed from pursuing civil penalties against a defendant under the False Claims Act after the government obtained restitution from the same defendant in an earlier criminal proceeding. Such a case does not exist, I suspect, because "[o]ur traditional division between civil and criminal procedure does not contemplate any opportunity for joining any civil claim with the criminal prosecution." Charles Alan Wright et al., 18 Federal Practice and Procedure (1981), § 4474 at 748.[17] This is true even when the government is also the plaintiff in a civil action that allows a criminal prosecution — "the claim is different" in the civil case. *Id.* at 749.

The government's claims differ in that the criminal prosecution is punitive — the purpose is to punish the

16. 18 U.S.C.A. § 3663-3664 (Supp. 1993).

17. *See also United States v. Fliegler,* 756 F.Supp. at 695 ("The restitution statute itself contemplates subsequent civil actions based on the same fraudulent acts as alleged and proven in a prior criminal action.").

defendant for his illegal conduct — while the civil suit is remedial, with the purpose of compensating the government for the injury it sustained as a result of the defendant's conduct.

Defendants argue that the effect of recent legislation, such as amendments to the VWPA and the civil False Claims Act, is to dissolve the differences between the purposes and ramifications of the government's conduct when it conducts a criminal prosecution and when it pursues a civil suit. Even if defendants are correct — and their position is not analytically unfounded — I do not agree with their argument in this case. If I did, I would have to agree with their assertion that the government is foreclosed from filing a civil suit against a defendant any time it elects to seek restitution against the same defendant at his sentencing. Because I disagree with this legal conclusion, I reject defendant's contention that the government's suit is barred by res judicata.

b. Collateral Estoppel

Defendants' second formulation of their estoppel argument is that because "the issue of the actual loss and damage incurred by the United States has already been determined in the criminal action . . . all claims requesting restitution, loss or damage by the United States are barred by the doctrine of collateral estoppel or issue preclusion." *See* Defendant's Response at 45.

In *Bower v. O'Hara,* 759 F.2d 1117 (3d Cir. 1985), the Court of Appeals set out the elements of a claim of collateral estoppel:

> 1. The issue sought to be precluded must be identical to the issue in the prior lawsuit;
>
> 2. The issue must have been actually litigated;
>
> 3. The issue must have been determined by a valid and final judgment; and

4. The determination must have been essential to the prior judgment.

Id. at 1125.

Given my earlier conclusion that government is pursuing a different claim in this civil suit than it pursued in the criminal prosecution, I believe that the issue sought to be precluded by defendants in this suit — the amount of damages sustained by the United States as a result of defendants' conduct — is not identical to the issue in the prior lawsuit. Accordingly, I conclude that plaintiff is not collaterally estopped from pursuing this lawsuit.

Furthermore, I conclude that the defendants have failed to satisfy the second element because they have not demonstrated that the parties intended to settle the government's civil claims against the defendants. Therefore, the stipulation before Judge Broderick does not amount to "litigation" of the issue defendants seek to preclude. *See generally* Restatement (Second) of Judgments, § 27, comment e (discussing whether stipulation may bind parties in future litigation).

c. Equitable Estoppel

Defendants also assert that the United States is barred from pursuing this civil action by the doctrine of equitable estoppel. In *United States v. Asmar,* 827 F.2d 907 (3d Cir. 1987), the Court of Appeals set out the elements for establishing a claim of equitable estoppel: "the litigant must prove (1) a misrepresentation by another party; (2) which he reasonably relied upon; (3) to his detriment.... [In addition], a litigant must prove 'affirmative misconduct' to succeed on an estoppel claim against the government." *Id.* at 912.

Defendants argue that the government "misrepresented to the defendant as well as to the Court that the Government would accept $300,000 in satisfaction of its total restitution claim." *See* Defendant's Response at 56. Because I disagree with this assertion and have concluded that the government did not settle all of its damages claims with defendants at their sentencing, I reject

defendants' contention that the government's action is barred by the doctrine of equitable estoppel.[18]

d. Judicial Estoppel

Finally, defendants claim that the government's suit is barred by the doctrine of judicial estoppel, which penalizes a party who asserts inconsistent positions in judicial proceedings. *See generally* Charles Alan Wright et al., 18 Federal Practice and Procedure (1981), § 4477 (discussing rules against assuming inconsistent positions).

Again, defendants' contention rests on their assertion that the United States represented that it would accept $300,000 in satisfaction of its total restitution claim and then repudiated this representation. Given my conclusion that this did not occur, I reject defendants' contention that the government's action is barred by the doctrine of judicial estoppel.

E. Statutory arguments

The False Claims Act was amended twice during the 1980s. Before 1985, the Act provided for an award of double the amount of damages and a penalty of $2,000 per false claim. As part of the Defense Authorization Act, the Act was amended to provide for treble rather than double damages for

18. In *United States v. American Diversified Defense, Inc.*, 702 F.Supp. 1551 (N.D.Ala. 1988), defendant, who had pled guilty to criminal charges, secured summary judgment in his favor in the subsequent civil suit filed by government. However, defendants' reliance on *American Diversified* is misplaced. Unlike the situation in that case, the government here has provided affidavits challenging defendants' assertion that the agreement between the parties at the sentencing hearing represented a global settlement. In addition, the defendant in *American Diversified* was an unemployed man with a family. The court refuses to enter judgment in the amount of $777,720 — the amount sought by the government — against him to avoid "manifest injustice." *Id.* at 1557. *See also id.* at 1561. Defendants have not demonstrated that entering judgment on behalf of the United States in this case would constitute a "manifest injustice." Indeed, as the Court of Appeals noted, Kress "paid the full $300,000 just two months after his release from prison." *United States v. Kress*, 944 F.2d at 160 n.8 (3d Cir. 1991).

false claims related to a Department of Defense contracts.[19] I refer to this amendment as the 1985 Amendment.

In 1986, Congress revised the entire False Claims Act. As part of this revision, it increased the damage award for all False Claims by allowing for treble damages rather than double damages and increasing the penalty from $2,000 per false claim to between $5,000 and $10,000. *See* 31 U.S.C. § 3729(a). I refer to this amendment as the 1986 Amendment.

Defendants make two arguments with respect to the amendments. First, they assert that as long as the 1985 Amendment exists, which it does, then its penalty provisions apply because it is the more specific statute. In its reply brief, the government contends that the 1986 Amendment was clearly intended to supersede the 1985 Amendment because the "later act covers the subject of the earlier one and is clearly intended as a substitute." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

In my view, the 1986 Amendment to the False Claims Act supplanted earlier versions of the Act. The purpose of the 1985 Amendment was to increase the amount of damages available to the government in a civil False Claims Act involving the Department of Defense. In addition, the 1985 amendment applied "notwithstanding" 31 U.S.C. § 3729. Because the 1986 Amendment provided for damages greater than those allowed under the 1985 Amendment, I believe Congress intended the 1986 Amendment to supplant the 1985 Amendment and that this reading of the two statutes is consistent with the "notwithstanding" phrase in the 1985 Amendment.

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19. The Department of Defense Authorization Act, P.L. 99-145, § 931, provided: "Notwithstanding section 3729 of Title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of $2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and the cost of the civil action."

Moreover, the 1986 Amendment is more specific because it concerns only various provisions of the False Claims Act while the 1985 Amendment revised the damages provision of the Act as part of a statute concerning the Department of Defense.

Second, defendants argue that the amendments increasing the damage awards should apply prospectively rather than retroactively. Their reliance on *United States v. Murphy,* 937 F.2d 1032 (6th Cir. 1991), and *United States v. Data Translation,* 984 F.2d 1256 (1st Cir. 1992), is misplaced, however. In those cases, the courts declined to apply amendments to the Act retroactively because to do so would have affected the "substantive rights and liabilities" of the defendants. *Murphy,* 937 F.2d at 1038. That is, applying the amendments retroactively would have penalized the defendants for conduct that was not prohibited when it occurred but became illegal after the Act was amended.[20]

However, defendants overlook a number of district court decisions that hold that the amendments to the Act's damage provisions do not affect the substantive rights of a defendant in a civil suit under the False Claims Act and, therefore, that the damage provisions of the False Claims Act apply retroactively. *See, e.g., United States v. Stocker,* 798 F.Supp. 531 (E.D.Wis. 1992); *Kelsoe v. Federal Crop Ins. Corp.,* 724 F.Supp. 448 (E.D. Tex. 1988); *United States v. Pani,* 717 F.Supp. at 1017; *United States v. Board of Education of City of Union City,* 697

20. In *Murphy,* the Court of Appeals reversed a district court decision granting the government summary judgment in its case against an electrical contractor for rigging bids. Because the 1986 Amendment broadened the meaning of "knowingly" under the statute to cover conduct "which the Sixth Circuit would not previously have viewed as criminal," the Court declined to apply the amendment retroactively. *United States v. Murphy,* 937 F.2d at 1036. In *Data Translation,* another case in which the government filed a civil suit under the False Claims Act, the Court of Appeals for the First Circuit states simply that it will follow the Sixth Circuit's holding in *Murphy. United States v. Data Translation,* 984 F.2d at 1266.

F.Supp. 167 (D.N.J.).[21] I will follow these decisions and apply the damage provisions of the 1986 Amendment retroactively.

F. Disputes over Damages

Because I reject defendants' legal arguments in support of their motion and conclude that it is appropriate to enter summary judgment in favor of plaintiff, my Order will require defendants to pay damages under the False Claims Act. I now address defendants' arguments with respect to the government's calculation of damages.

1. The government's damages calculations

Essentially, plaintiff asserts that "[t]he United States is entitled to the difference between the inflated amount proposed by EDN for each of the fraudulent items and the actual cost for these items to EDN, together with the applicable percentage of administrative expenses and profit contained in the company's contract proposal." *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, filed June 18, 1993, at 13. In their answers to the government's interrogatories, defendants set out the amounts they paid for various items.

The government calculates that the difference between EDN's proposed costs and its actual costs were $67,221.39 in 1983: $119,519.72 in 1984; $147,190.35 in 1985; and $170,445.52 in 1986, and thus, that the total damages to the government over the four-year period amount to $504,376.98. In addition, plaintiff asserts that it is entitled to $61,400 in damages for the bribe paid by Kress to Baxter. I have reviewed the exhibits attached to both parties' memoranda and find that the government's calculations are accurate.

Citing *United States v. Hibbs,* 568 F.2d 347 (3d Cir. 1977), defendants assert that the government's calcula-

21. *See also Tyger Construction Co. United States,* 1993 U.S. Claims LEXIS 5, *45 n.20 (1993) (collecting cases).

tions are flawed because they do not establish causal connection between defendants' illegal conduct and the government's injury. That is, according to defendants, to the extent that their guilty pleas did not establish the amount by which their estimates inflated defendants' actual costs, the pleas do not assist the government in calculating the damages suffered by the government as a result of defendants' conduct. Defendants therefore contend that the government must present a good-faith estimate by an outside vendor of defendants' actual expenses and cannot simply rely on the amount paid by defendants for various items.

Defendant's reliance on *Hibbs* is misplaced. That case concerned the liability of a real estate broker who submitted false certifications to the Federal Housing Administration. The Court of Appeals held that the government was not entitled to recover damages sustained by the United States as a result of events unrelated to the false certifications, such as an injunction against the use of lead-based paint that resulted in the houses "becoming almost worthless on foreclosure." *Id.* at 350.

Here, there are no events that injured the United States other than defendants' submission of false claims. Furthermore, I believe that the most reliable and accurate measure of the government's damages is the difference between the inflated costs proposed by defendants for the fraudulent items and the actual cost for those items. *See, e.g., United States v. Woodbury,* 359 F.2d 370, 379 (9th Cir. 1966) ("Ordinarily, the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would if the claims had been truthful.").

Defendants contend that the Court should not grant summary judgment because defendants did not produce all of the documentation necessary for the government to calculate that actual cost of the fraudulent items. Specifically, they contend that it "is unreasonable to hold the defendants responsible for the full amount of the difference between documented and proposed costs, when the

documentation has been in the Government's possession for years and is clearly incomplete." *See* Defendant's Response at 74-75. Because defendants have not demonstrated how the incomplete figures entitle Kress and EDN to a reduction in damages, I reject their objection.

Defendants next assert that the government's computation of damages overstates the amount of damages suffered by the government for false invoices for paper. They note that EDN submitted good-faith estimates from an outside vendor in 1983 and 1984 along with their false invoices for paper. However, as the government counters, the good-faith estimates overstate the amount of paper actually ordered by EDN. I am not persuaded by defendants' argument that I should reject, or even modify, the government's calculation of damages.

Defendants also object to plaintiff's use of EDN's proposed rate of profit, 22 percent, in its calculation of damages. They assert that there is no evidence that the government accepted this proposed rate of profit and contend that "the most reasonable way to calculate the amount [of damages incurred from the profit figures] is to take Kress' proposed total cost for 1984 . . . and subtract that from the final contract price . . . . The resulting difference constitutes 13.34% of the total contract price." *See* Defendant's Response at 77.

The government disagrees, citing *United States ex rel. Taxpayers against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989). In *Singer,* Judge Murnaghan stated that "[t]he law provides for a rebuttable presumption that the government is damaged dollar-for-dollar by the nondisclosed amount once nondisclosure is shown." *Id.* at 1333. He elaborated:

> The obvious premise upon which the presumption operates is that the fraudulent inflation of cost proposals fundamentally distorts the negotiation process for a sole-source contract and that the eventual contract price likely would have been even lower than the company's "best estimate" had the contractor

> instead provided the government with that uninflated estimate at the start of negotiations.... the offender must show that it would not have accepted further reductions, i.e., the government would still have spent that amount or the offender would not have contracted at all, to rebut entirely the presumption.

Id.

Under *Singer,* according to the government, "in the absence of any evidence to the contrary from defendants, where a single price is negotiated, the presumption must be that the United States is damaged dollar for dollar by the full amount of the related indirect costs and profits." *See* Plaintiff's Reply Brief, filed July 30, 1993, at 24. I agree. Because defendants have not produced any contrary evidence, I reject their contention and accept the government's use of the 22 percent proposed profit figure in their damages calculations.

Defendants assert that the amount they have paid as restitution should be deducted before the court trebles the government's damages. The government responds that defendants' position is inconsistent with *United States v. Bornstein,* 423 U.S. 303, 316 (1976) (under old False Claims Act, the government's actual damages were "to be doubled before any subtractions are made for compensatory payments received by the Government."). Defendants have not persuaded me that the amendment of the False Claims Act, which allows for treble rather than double damages, requires the Court to disregard the formula for calculating damages under *Bornstein. See, e.g., United States v. Pani,* 717 F.Supp. at 1017 (S.D.N.Y. 1989) (subtracting amount paid by defendant in restitution after trebling damages and adding $10,000 for each false claim).

Defendants also briefly assert that some of the false invoices giving rise to defendants' liability were submitted more than six years before plaintiff filed its complaint on October 31, 1989. The government rebuts this assertion with an affidavit from a financial officer who states that the United States did not receive any of the invoices until November 1,

1983, within the six-year limitation provided in the False Claims Act. Accordingly, I reject defendants' statute of limitations argument.

Defendants' final contention is that the government's attempt to collect damages for the amount of defendants' bribe to Colonel Baxter constitutes a double recovery because the injury to the United States caused by Kress' illegal payment to Colonel Baxter is accounted for in the damages based on the contract amounts paid to EDN. Defendants assert that the government is not entitled to claim the $61,400 payment as damages distinct from the government's contract damages.

Citing *Continental Management, Inc. v. United States,* 527 F.2d 613 (Ct.Cl. 1975), the government responds that the harm caused to the negotiating process is distinct from that caused by the submission of fraudulent pricing information. *See* Plaintiff's Reply Brief, filed July 30, 1993, at 26. I agree with the government's reading of *Continental Management* and reject defendant's contention that *Continental Management,* which values the government's damages as the amount of the bribe, applies only when there is no other way to measure the government's damages.

In conclusion, I reject defendants' legal arguments in support of their motion for summary judgment. My review of the government's exhibits and calculations leads me to accept their figure of $504,376.98 for damages incurred as a result of defendants' conduct set out in the indictment. Trebling this figure amounts to $1,513,130.94. I then add the amount of the bribe, $61,400, making a total of $1,574,530.94. I also add $1,070,000, based on 214 false claims multiplied by $5,000, the penalty authorized by the False Claims Act and sought by the government. Finally, I credit the $300,000 restitution payment made by Kress as a result of his sentencing in the criminal case. The government is therefore entitled to judgment in the amount of $2,344,530.94.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	
	:	
EDUCATION DEVELOPMENT NETWORK, INC., et al.	:	No. 89-7780

ORDER

AND NOW, this 20th day of December, 1993, upon consideration of plaintiff's motion for summary judgment, defendants' cross-motion for summary judgment and the supporting and opposing memoranda thereto, it is hereby ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED.

2. Judgment is entered against defendants Gerald Kress and Educational Development Network, Inc. in the amount of $2,344,530.94.

3. Defendants' cross-motion for summary judgment is DENIED.

THOMAS N. O'NEILL, JR., J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1725

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION;
GERALD KRESS; ROBERT ALLEN BAXTER,

Educational Development Network Corporation
and Gerald Kress,

Appellants

ORDER

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN *Circuit Judges*

Appellee is ordered to file an Answer to the Petition for Rehearing filed in this matter within fourteen (14) days of the date of this Order.

By the Court,

Circuit Judge

Dated: February 13, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1725

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION;
GERALD KRESS; ROBERT ALLEN BAXTER,

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SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE and SAROKIN *Circuit Judges*

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: March 10, 1995